

Nguyen (Migration) [2018] AATA 1670 (23 May 2018)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Anh Vinh Nguyen
CASE NUMBER:	1618621
DIBP REFERENCE(S):	CLF2013/80327
MEMBER:	Meena Sripathy
DATE:	23 May 2018
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the application for a Partner (Residence) (Class BS) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 801 (Partner) visa: • cl.801.221(2) of Schedule 2 to the Regulations apart from the criterion that the applicant hold a Subclass 820 visa.

Statement made on 23 May 2018 at 1:18pm

CATCHWORDS

Migration – Partner (Residence) (Class BS) visa – Subclass 801 (Partner) visa – Genuine and continuing relationship – Further updated evidence submitted to the Tribunal – Co-habitation – Living at the same address since 2012 with the Sponsor’s son – Joint account used to pay for living expenses – Sponsor owns the house – Parties work together – Presented to official bodies as a married couple – Plan to have further children – Decision under review remitted

LEGISLATION

Migration Act 1958 ss 5F, 65

Migration Regulations 1994 r 1.15A Schedule 2 cl 801.221

CASES

MILGEA and Dhillon [1990] FCA 144

Garcevic v MIAC [2012] FMCA 931

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 378 of the Migration Act 1958 and replaced with generic information.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 17 October 2016 to refuse to grant the applicant a Partner (Residence) (Class BS) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 12 April 2013 on the basis of his relationship with his sponsor. At that time, Class BS contained only one subclass: Subclass 801 (Partner). The criteria for the grant of this visa are set out in Part 801 of Schedule 2 to the Migration Regulations 1994 (the Regulations). Relevantly to this matter the primary criteria include cl.801.221. The applicant was granted a Subclass 820 (Partner Temporary) Class UK visa on 6 June 2014.
3. The delegate refused to grant the visa on the basis that the applicant did not satisfy cl.801.221 because the delegate was not satisfied that the applicant and sponsor were, at time of decision, in a genuine and continuing spousal relationship.
4. The applicant appeared before the Tribunal on 5 April 2018 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor and from Ann Ho Chau, a family friend of the applicant and sponsor. The Tribunal hearing was conducted with the assistance of an interpreter in the Vietnamese and English languages.
5. The applicant was represented in relation to the review by his registered migration agent.
6. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

7. The review applicant is a 37 year old man of Vietnamese nationality. He has parents and one brother in Vietnam. He indicates no previous marriages or de facto relationships. In the Form 47SP application form he claims to have met the sponsor on Christmas day in 2012, and they married on 12 January 2013. The sponsor is a 48 year old Australian citizen by grant, having arrived in Australia in 1998. She has parents and 5 siblings in Vietnam. She was previously married to Van Anh Do from 2008 to 2010, and this relationship ended in divorce.
8. Various documents and supporting evidence was submitted with the application, including undated written statements from the applicant and sponsor, a divorce certificate in respect of the sponsor's previous marriage; a marriage certificate relating to the applicant and sponsor's marriage on 12 January 2013; letters dated 8 October 2012 and April 2013 from sponsor's medical practitioners relating to her health condition and support/care from the applicant referred to as her partner; photos of the parties together; various utility and telephone bills in joint names during 2014; receipts addressed to the parties for various items; Statutory Declaration Form 888 from Ann Chau and her husband Cong Duc Huynh dated April 2015; CBA account statement for an account in joint names for the period July – December 2014; Sponsor's CBA account statement and Statutory Declarations from the applicant and sponsor dated 20 April 2015; drivers licenses showing the same residential address.
9. The Statutory Declaration from the applicant states that they have been living together for over 2 years, they work together at the same place, full time. They have a joint account

which they use to pay for all their expenses including groceries, fuel and other expenses. The sponsor gives him extra cash as needed each week. As a result of the sponsor's [surgery] in July 2012, the applicant does most chores at home. She does most of the cooking and he does the preparation and washing and cleaning. They hardly go out because they work so much. They support each other emotionally and financially. He looks after the sponsor when she is sick. When she had [an] operation he had to postpone his studies to look after her. He cared for her and also went to work in this period. [Sentence deleted]. They are always together and support and love each other.

10. The Statutory Declaration from the sponsor states that she owns a [business] at [a location] and they both work there full time. They transfer most of the profits into the joint bank account. She bought a 2 bedroom unit in [a suburb] before she met the applicant and has a mortgage on this property which is paid from a [bank] account at [amount] per month. In July 2012 she had [an] operation and since then the applicant has taken responsibility for most of the household duties. The applicant prepares food and she cooks it, he cleans, except for the bathroom. Her adult son lives with them. They are together most of the time. They do not go out much because of her ill health. The applicant takes her to the doctors and helps her with her medication. They are committed to each other. The applicant has supported her when she is sick and supports her emotionally. The time of her [operation] was very stressful [but] they got through this time together.
11. The delegate considered this material but was not satisfied that it demonstrated the applicant and sponsor are in a genuine spousal relationship and refused the application on this basis.
12. Before the Tribunal the applicant has submitted further updated evidence in support of the application including statements of the joint bank account for the period July 2017 to February 2018, more jointly held utility accounts, Vodaphone bills, evidence of travel together to Vietnam in June 2016, applicant's and sponsor's 2016 tax assessment indicating declaration of the sponsor as his spouse; various photos of the parties together and with friends in social settings; photos of the parties in Vietnam with each other's families; rates notice in respect of the [property]; various medical letters relating to the sponsor's health issues in 2016, 2017.
13. The applicant's representative provided a chronology of the relationship in a submission dated 27 March 2018, and addressed the delegate's concerns about inconsistencies regarding the claimed date the relationship commenced. It was pointed out that the applicant made a typographical error in his application form when he stated they met on 25 December 2012. The sponsor provided the correct information in her Form 40, stating they met 25 December 2010, and the applicant also indicated in the Form 40 that he commenced living at the sponsor's address in May 2012.
14. At the hearing the applicant confirmed his current address and that he has lived here since May 2012 with the sponsor. The sponsor's son was also living with them, from 2014 until January this year. Prior to 2014 he was in Vietnam, he has been back and forth between Australia and Vietnam until he came to Australia in 2014. The applicant said he first met the sponsor's son in 2014 when he came to Australia, he did not know when the son was in Australia prior to that. The applicant told the Tribunal the son works in Newcastle so he moved out to be closer to his work. He said the son calls him 'uncle'. They get on well and have no problems.
15. The applicant works with the sponsor at her [shop]. She has owned this business for over 12 years. Prior to the current location he worked with her at the previous location. He was working with her prior to their marriage. He knew the sponsor before he started working for her. The applicant told the Tribunal he came to Australia on a student visa to do a dental

technician course. He studied until the last term of the courses, and only stopped to look after the sponsor after her [surgery]. He would like to go back to finish the course in future.

16. He has no family in Australia. In Vietnam he has a younger brother who has completed a university course in Accounting and works for a company. He is not married and lives at home with his parents. The applicant's father is retired and his mother still works as a dentist. They live in Can Tho, Vietnam. The sponsor has parents and 5 siblings in Vietnam. She only has her son in Australia. Her family are in Hanoi.
17. The applicant was aware of the name of the sponsor's previous partner. He is in Vietnam. They were separated since 1996 or earlier. He never came to Australia. She remarried in 1998 but it did not last more than one year. She was sponsored for a Partner visa by that partner and then they separated. After that she had another relationship in 2008. The applicant was aware of his name also. This relationship only lasted a few months. He did not like it in Australia and he returned to Vietnam. The applicant confirmed that this was the sponsor's 4th relationship. He has not had any previous relationships.
18. They met at a Christmas party in 2010 through a common friend. They talked and met up again about 2 weeks later and developed a relationship after that. He was living in shared accommodation [at] that time. She visited him a few times there.
19. The Tribunal put to the applicant given the age difference between them, and the fact that she has had a number of previous relationships, why did he decide to be in a relationship with her? He said he liked her character, her independence and that she was hard working. He moved in with her in May 2012 and after that their love developed and they had many opportunities to help each other and decided from then to marry. The Tribunal asked why he decided to move in with her. He said they were boyfriend and girlfriend by then and from January 2012, their love had developed to a high point.
20. The Tribunal asked about the ownership of the sponsor's house. He confirmed that she owned it and bought it in her name only at the beginning of 2012. She did not discuss it with him. The Tribunal asked why, if their love was at a high point, did she not discuss her decision to buy property? He said she did not because he was only her boyfriend then. It asked him whether he contributed any money towards the purchase. He said he did not. When asked if he knew how much it cost, he said it was [amount] and she obtained [a] loan from [the bank] and the remained was savings and her siblings helped her. The mortgage is [amount] per month. He contributes towards the mortgage payments because their income from the [shop] pays the mortgage. He also contributes to other bills.
21. The Tribunal asked about the financial arrangements in their relationship. He said their income from the [shop] is around [amount] per week. They have a common account and share petrol, food, groceries and taxis from this account. She pays him a wage after all the other business expenses are paid. She pays him [amount] and herself [amount] per week. The Tribunal noted that the joint account statement does not show any income from the business deposited into it. He said she has a business account in her name. He has no other account in his own name. The Tribunal put to the applicant that his evidence that she took [a] mortgage on a [property] is quite different to her evidence in her Statutory Declaration that she has a [lesser] mortgage. He said she told him it was [a type of] loan. He said he believes she received help from her family overseas. He believes she received amounts in cash [from] friends who travelled from Vietnam. For example in 2012 when her sister Dong travelled from Vietnam at the time of her [surgery], she brought her some money. At the beginning of 2015, another sister Phuong, came to take care of her after surgery. The Tribunal asked the applicant why the sponsor needed her sister's to come to look after her if he was there? In response, he said in July 2012 her sister applied for a visa and they were

not sure if it would be granted so he ceased his study to be able to support and take care of her. Her sister was granted a visa for 3 months but only stayed for 2 months.

22. Regarding utility bills, the applicant confirmed that the electricity and gas are in joint names but the water and council rates are in the sponsor's name only. When asked if the sponsor has a will, he said he is aware that she has named him as a beneficiary on her superannuation account, in March 2018. The Tribunal noted that this can be done and changed easily and it was only done a week prior to the hearing so it may not place great weight on this. Regarding the issue of the will, he said they have not thought about this.
23. Regarding living arrangements, the applicant said they go to work together. She cooks and they eat together 2-3 times a week. He does the cleaning, sweeping, laundry and help with heavy duties. When asked what she cooks for him he said normal Vietnamese things, pho, congee. When asked what food he likes, he said they have similar tastes.
24. The Tribunal asked the applicant to recount something the sponsor told him recently. He said she told him about [an] operation her sister Phoung had recently. The Tribunal asked if he has visited her family. He said in June 2016 they travelled to Vietnam together and visited his family first in Can Tho and stayed for one week, then went to Hanoi to her family. The applicant said her son travelled with them on this trip, but did not come to visit his family. The applicant and sponsor had a 4 week trip and he stated that they were together every day throughout this time. He told the Tribunal his parents were aware that she had a son. They got on well with the sponsor. She met his brother also. There was no issue raised by the age difference between them. When asked if they did anything special together during this trip he said because of her problems with her [body], they mostly only visited family. They visited an environment garden in Can Tho with his mother, brother and wife. Apart from this trip they have not had any other holidays.
25. The Tribunal asked the applicant about his knowledge of the sponsor's health conditions. He knew she had the operation [then] had [another medical] issue and in January 2015 she had [another] operation. She also had some procedure [at] the beginning of this year, she travelled to this by taxi but he collected her.
26. The applicant stated that they have now lived together for over 6 years and are discussing having a baby now. It doesn't matter if it is a girl or boy. They have been trying for a while now but no success. He said they recently contacted a doctor to get some advice about fertility. He did some tests and told them that she has a chance to get pregnant but due to her age it could be difficult. He told them they could think about IVF but it would have a bad effect. The applicant told the Tribunal he wants to have children but if they cannot he will be sad but he will support his wife because of her disadvantages with her health.
27. When asked how she supports him he said she loves him and supports his spirit. She cares about his family and brother. When pressed to provide more specific examples, he said they go to work everyday together and share difficulties. In July 2017 he fell down and hurt his leg and she looked after him. When asked if there are any topics they fight or argue about, he said she gets angry with him if he is lazy and doesn't clean.
28. The representative requested the Tribunal to clarify two matters with the applicant, relating to his understanding of the sponsor's health issues and whether he had a wedding reception in Vietnam. The Tribunal asked again about these two issues. The applicant clarified that the sponsor has a [medical condition] which is still being investigated. He also clarified that he had two celebrations in Vietnam, one with his family in Can Tho and one in Hanoi with her family to meet each other's families.

29. *Evidence from sponsor*

30. The sponsor confirmed her address and that she lives with the applicant. She said her son Duc Anh Vu was also living there since 2012. Before that he was in Vietnam. She first sponsored him to migrate about 10 years previously. He came for 1-1.5 years and returned to Vietnam. He then returned to Australia in 2012 and lived with her at the current address. She said he was already living with her when the applicant moved in with her in May 2012. Her son moved out of their place after new year this year. He moved to Newcastle because of work. He gets on well with the applicant, they have no issues. The Tribunal asked why then is there no evidence from him in support of the application. She said he could not attend the hearing because of work. He can provide a statement, they just didn't know that it was necessary or helpful.
31. The Tribunal asked if her son attended their wedding. She said he did not because it was a long distance. They did not have a wedding ceremony here, just a paper wedding because they were reserving their money for the celebrations in Vietnam where they have their families. Her son came to Vietnam with them and attended the ceremony they had in Hanoi, but not the ceremony in Can Tho.
32. The Tribunal asked the sponsor about her own migration history. She said she came to Australia in 1998 on a visitor visa. She intended to study life here and run a business. She then met a man and married him. The relationship lasted about 2 years but he did not like her going out and he played poker machines. They fought and eventually separated. After a few years she met another man who had come here on a tourist visa. They married but 3-4 months later he returned to Vietnam. She did not sponsor him for a visa. She was married to her son's father, it lasted about 4 years. He is still in Vietnam. The Tribunal put to the sponsor, given her relationship and migration history, it may have concerns that this relationship is not genuine but for migration purposes. In response she said the applicant is not that type of person. He cared for her when she was sick. They are sharing a house and have been living together for 6 years and love each other very much. If he didn't love her he wouldn't have cared for her when she was sick.
33. The Tribunal asked the sponsor if she had any other family support when she had her operation in July 2012. She said she did not. When the Tribunal then said that the applicant mentioned her sister had come, she said she forgot, she had so many operations at this time her memory is not clear. She now recalls her sister came but only stayed two months and returned. When asked why her sister needed to come if husband was looking after her, she said he needed to look after the business. He helped in the evenings with bathing and taking her to the toilet, her sister is old and she mainly helped with the cooking. The Tribunal noted that in 2015 she had another operation and another sister came and asked why she was necessary this time. She said the applicant went to work in the business and her sister helped during the day. It wasn't necessary for her to come, she also wanted to see her as it had been a long time since she saw her sister.
34. The Tribunal asked the sponsor about her knowledge of the applicant's family. She said she stayed with his family for a week when they travelled to Vietnam. His brother helps in the family business. His mother works as a dentist, and his father is also a dentist. She said he is still working in the family business. She didn't know anything else about his brother's work or qualifications. When asked why she doesn't know more after 4 years of marriage, she said the applicant doesn't talk to her much and she doesn't ask him many questions. When it was put to her that the applicant told the Tribunal his father is retired, she said he has a problem with his [body] also and mainly it is his mother who works.
35. The Tribunal asked the sponsor about her knowledge of the applicant's visa history. She said he came to study about making false teeth. He ceased his study when she had her surgery and hasn't returned to his study since then. He now helps her in her business. She is not sure if he intends to return to his study in future.

36. They met at a party of a mutual friend. They exchanged numbers and a relationship between them developed after that. He did not mention any previous relationship to her. The Tribunal asked the sponsor if her history of past relationships and the age difference between them has been an issue in their relationship. She said they were close friends for a long time before they married and the age difference has never been an issue for either of them because they understand each other and love each other. When asked what she likes about him she said he doesn't talk much, he is kind and he takes care of her.
37. The Tribunal asked if the sponsor knew where he was living before he came to live with her. She said he was sharing a room in a house [but] she never went there. The Tribunal put to her that he said she had been there a few times. In response she said she went there just to pick him up. When asked why he came to live with her she said they spent a long time getting to know one another and decided to go further into each other's lives.
38. The Tribunal asked when she bought the [property]. She said she bought it around January - February 2012 and moved in around March – April. When asked if she talked to the applicant about it, she said she did not because they were only boyfriend and girlfriend at that time and she did not think it was necessary to discuss. She told the Tribunal the property cost around [amount] to [amount]. She used her savings and obtained a home loan [for] the property. She said the applicant did not contribute any amount to the purchase of this property. The Tribunal put to her that in her Statutory Declaration in 2015 she stated that she had a [mortgage] and asked where the money came from to reduce her mortgage by that much. She said she refinanced the home loan and had savings and borrowed money from a friend. The Tribunal put to the sponsor that it may have a concern given the timing of the purchase of the property before the marriage that the applicant may have given her money to apply for a visa and asked her if she can provide evidence of the source of her funds. She said at this point that her son also contributed some funds.
39. Regarding financial arrangements between them, the sponsor said that she pays most of the bills. Their income from the business is around [amount] per month. After paying all the salaries they put the rest into a common account and use this to pay expenses such as petrol and other things. She also has her own account in her own name and a business account. The Tribunal requested her to provide statements from these other accounts.
40. The sponsor confirmed that the applicant is paid a salary of [amount] per week and she is paid [amount] per week. He pays bills from the joint account if she is busy.
41. The Tribunal asked the sponsor if she has made a will. She said she has not thought about that yet, but has a plan that 50% will go to her son and 50% to the applicant. She hasn't put that in writing as yet, it is just her thinking. She has named the applicant as the beneficiary on her superannuation. The Tribunal noted that she has provided this document but it was only done very recently.
42. Regarding her health conditions the Tribunal asked the sponsor if the applicant has accompanied her to any medical appointments. She said he came with her to an appointment regarding a [certain health] problem, and recently she had a procedure and he picked her up. The Tribunal asked the sponsor if she and he have discussed having children. She said they have discussed this. About 2 years ago they went to see a doctor and he gave them 2 options, natural but because she has [a medical condition] he also discussed IVF with them. They went to this appointment together. The Tribunal noted that the medical letters she has provided does not indicate he was present. It asked her if he had any fertility testing. In response she said they both paid some Medicare fee. It put to her that if they were seriously considering children, why didn't they take any further action since their appointment, given her age. She said they have talked seriously about it and the doctor told her even at her age up to 50-52 she has a chance to get pregnant naturally but

she has been busy with her work and business and has not had a chance to do anything further. They may come back to this later on. The Tribunal put to her its concern that she may not be telling the truth about this matter as it may not accept that a fertility doctor would tell her at her age that she can get pregnant naturally and it may find she is not genuine in her account of the relationship. In response she said the doctor talked about two options, one was natural conception and the other was IVF using a donated egg such as from a relative. He told her it was possible even if hard.

43. The Tribunal asked about other agencies she has declared her relationship to. She said she declared it to Centrelink and also ATO.
44. When asked if there is any topic they argue or fight about, she said the applicant is a quiet person and nothing makes him angry. She gets annoyed at him sometimes at work when he doesn't respond to her quickly. They don't fight about anything at home.
45. The Tribunal invited the applicant to comment on the sponsor's evidence. He said in response that their love is true and genuine and they just seek special consideration to continue to have a stable life.
46. The representative asked the Tribunal to clarify with the applicant two matters. When the son came to live with them and secondly whether she received any money from her relatives. The Tribunal clarified these matters with the applicant. It put to him that earlier he had said that her son came to live with them after he had moved in. The applicant confirmed that this was his evidence. He said then that he is blurry about this period and he is not exactly sure.
47. Following the hearing, the applicant's representative forwarded to the Tribunal the following documents:
 - The applicant and sponsor's tax returns for financial years 2014-2017
 - Statements from 5 different bank accounts in the applicant and sponsor's names from 2013 -2018
 - Letter dated 9 April 2018 [from a medical professional], referring to an earlier consultation attended by the applicant and sponsor in November 2016; and a letter dated 16 April 2018 from [another medical professional].

48. **FINDINGS AND REASONS**

49. The issue in the present case is whether the applicant and sponsor are in a genuine spouse relationship at time of decision.

Whether the parties are in a spouse or de facto relationship

50. Relevantly to this matter, cl.801.221(2)(c) requires that at the time of this decision, the applicant is the spouse of the 'sponsoring partner', who must be an Australian citizen or Australian permanent resident or an eligible New Zealand citizen who was specified in the related Subclass 820 visa application as the spouse or de facto partner of the applicant. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen and was identified in the Subclass 820 visa application. On the evidence before it, the Tribunal is satisfied that the sponsor is the 'sponsoring partner' of the applicant.
51. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must

be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a) - (d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and sponsor's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.

Are the parties validly married?

52. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spousal relationship met?

53. The applicant and sponsor claim to have met in 2010 and commenced a relationship after that, and he moved into her address in or around May 2012 and has been living at that address since then. The Tribunal accepts there is evidence before it which corroborates that he has been living at that address since that time. It has some concerns about the inconsistency between the applicant and sponsor's evidence about the sponsor's son also living with them. The applicant told the Tribunal that he came to live with them in 2014 after the applicant had moved in, whereas the sponsor in her evidence said her son was living with her in 2012 and was already there when the applicant came to live with her. Movement records for the sponsor's son indicate he has been living in Australia October 2012, having spent a period of some 5 months here in 2009. Given this evidence it appears both the applicant and sponsor have incomplete recollections about this matter. The Tribunal acknowledges that a significant amount of time has passed and the confusion and inconsistency in their evidence could be attributable to failed memory. It also accepts that whether the sponsor's son was already living there, or came to live with them after the applicant moved in, is not necessarily material to the actual issue before the Tribunal. At best it goes to the matter of their credibility and as the Tribunal accepts that the inconsistency could reasonably be explained by poor memory, it draws no adverse inference. Ultimately on the weight of evidence before it, the Tribunal accepts that the applicant and sponsor have been living at the same address since 2012 and therefore over 6 years now, and it gives this fact due weight in its assessment of the nature of their relationship.
54. Regarding financial aspects of the relationship, the applicant and sponsor have consistently claimed that they pool their finances and have a joint bank account through which they pay most of their living expenses. They also acknowledged that the sponsor maintains accounts in her own name and also has a business account through which the income from the business is processed. They have provided statements from all of these accounts to the Tribunal. This evidence supports their claims that the applicant and sponsor are each paid an income from the business and this income is used to pay their living expenses. The Tribunal is satisfied that this evidence is consistent with the existence of a genuine relationship. The evidence also reveals however that the sponsor has a property, purchased during the period when she and the applicant were dating each other, although they were not living together at that time, which is solely in her name. The Tribunal has some concerns about the timing of her acquisition of this property, and the source of funds from which she was able to buy it. The applicant and sponsor both stated that he did not contribute to its purchase. There is no other evidence before the Tribunal to indicate the source of the funds and, given their denial he gave her any money it has no evidentiary basis on which to

conclude otherwise. As the property was purchased prior to the marriage, on its face it is not necessarily inconsistent with the existence of a genuine relationship.

55. Regarding the evidence of social aspects of the relationship, the Tribunal accepts the applicant and sponsor have declared themselves as spouses to the ATO since 2015 and accepts the sponsor's evidence that she also declared herself as partnered to Centrelink. It accepts the sponsor has nominated the applicant as her beneficiary for the purposes of her superannuation, but notes she has yet to make a will. It accepts on the evidence before it, including their oral evidence, photos and receipts that they travelled to Vietnam together and met each other's families there in June –July 2016. However, the Tribunal also observes and places some weight on the absence of any supporting evidence or statement from the sponsor's son, especially given that he apparently resided with them for 6 years.
56. The sponsor told the Tribunal the applicant has been supportive and caring of her through various illnesses and periods following surgery in recent years. However, they both also gave evidence that on two occasions her sisters have visited Australia to provide support which somewhat contradicts their claim about the support and reliance she had on him. The Tribunal accepts that the applicant was likely working and looking after the business during her periods of illness and personal care and household support came from her sisters.
57. The parties both gave evidence at the hearing that they have discussed and are still interested in having children in future. They referred to having sought fertility advice in the past about this and provided evidence of letters from doctors in support of this claim. The Tribunal has considered this claim and the evidence provided but does not accept that they have genuinely pursued having children as claimed. Given the sponsor's age at the time she sought the fertility advice (47 years old in 2016) and her failure to follow up since then, despite maintaining before the Tribunal that they are still interested in having children, leads the Tribunal to conclude that this claim lacks credibility and it rejects it for this reason.
58. Finally with regard to the nature of their commitment, the Tribunal observes that the applicant and sponsor have now been married and living together for over 6 years. It accepts that they have presented to official bodies including the ATO and Centrelink as a married couple. It accepts that as well as living together, they also work together in her [business] and not surprisingly have a degree of familiarity and dependence upon one another as a result.
59. While not without concerns about certain matters as indicated in the discussion above, having considered all of the circumstances of the relationship including the specific matters referred to in r. 1.15A(3), the Tribunal is mindful of judicial authority which provides that people enter into marriages with a variety of purposes and motives and that it is not necessarily inconsistent with a genuine marriage relationship that it was entered into by one or both parties with a view to material benefit or advancement, as for example with the hope of becoming eligible to reside in a particular country.¹ On balance therefore, taking into consideration judicial authority and all of the material before it, the Tribunal is prepared to give the applicant the benefit of doubt, and is satisfied that applicant and the sponsor live together and have a mutual commitment to shared life to the exclusion of others and are in a genuine and continuing relationship.
60. Given these findings the Tribunal is satisfied that the requirements of s.5F(2) are met at the time of this decision and therefore the applicant meets cl.801.221(2) apart from the criterion that the applicant hold a Subclass 820 visa.

¹*Re MILGEA and Dhillon* [1990] FCA 144 (Northrop, Wilcox and French JJ, 8 May 1990), See also *Garcevic v MIAC* [2012] FMCA 931 (Raphael FM, 11 October 2012) at [34].

61. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 801 visa.

DECISION

62. The Tribunal remits the application for a Partner (Residence) (Class BS) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 801 (Partner) visa:
- cl.801.221(2) of Schedule 2 to the Regulations apart from the criterion that the applicant hold a Subclass 820 visa.

Meena Sripathy
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).